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JOSEPH F. SPANIOL, JR.
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No. 85-1704

In The

Supreme Court of the United States

October Term, 1985

JOSEPH S. WOOL,

Petitioner,

v.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Did the petitioner receive adequate notice of the charge that he violated the Code of Professional Responsibility and specifically Disciplinary Rule 9-101(c)?

2. Did the respondent United States District Court for the District of Vermont base its disciplinary order on the determination that the petitioner had violated Disciplinary Rule 9-101(c) by implying to his client that he could influence the district attorney and the district judge by improper means?

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STATEMENT OF THE CASE

The United States District Court for the District of Vermont, sitting as a three-judge tribunal, found that the conduct of the petitioner, Joseph S. Wool, "was against long accepted standards of the legal profession." (Peti-

tioner's Appendix, p. 22) (hereinafter referred to as P.A.) The court's finding was based on the precepts of Canon 9, disciplinary rule 9-101, of the Code of Professional Responsibility and on the ethical considerations preceding that rule, citing 12 V.S.A. App. IX, pp. 285-86 (Supp. 1985). The court invoked also the provisions of Canon 1 and disciplinary rules 1-102(4) and (5), citing 12 V.S.A. App. IX, pp. 223, 225 (Supp. 1985).

Petitioner was given clear, written notice that the inquiry into his fitness to practice was based upon allegations that he stated or implied that he could bring improper influence to bear on the outcome of a criminal case. Paragraph 11 of the petition for order to show cause (P.A., p. 37) alleged that both Marcel Cormier and Denise Cormier (brother and sister of Rene Cormier, petitioner's client) received the impression from speaking with petitioner that money paid to him would be used as a payment to obtain the early release of Rene Cormier. Paragraph 12 of the petition for order to show cause alleged that in conversations with Rene Cormier and Denise Cormier, petitioner stated that he had special influence with the judge and prosecuting attorney (P.A., p. 37). In fact each paragraph of the petition for order to show cause from 11 through 16, inclusive, plus paragraph 9, alleged either that petitioner stated that he had improper influence, that he gave people from whom he was seeking employment or collection of a fee the impression that he could exercise improper influence, or that he could assure his client, Rene Cormier's release from incarceration by a date certain (P.A., pp. 36-39). Finally, paragraph 19 of the petition for order to show cause cites disciplinary rule 9-101(c) of the Code of Professional Responsibility

as adopted by the Vermont Supreme Court and the United States District Court for the District of Vermont, and quoted it as follows:

> A lawyer shall not state or imply that he is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official.

Thus, petitioner was not misled as to the thrust of the petition for order to show cause. Moreover, in the taking of pre-hearing depositions and in cross-examining witnesses at the hearing, petitioner sought to establish that he had never made any hard promises and that his words had been misunderstood.

Petitioner has not argued that the evidence was insufficient to sustain this charge. Rather, he asserts that the district court really disciplined him for taking an excessive fee, a charge of misconduct of which he had, so he claims, no notice.

There are two answers to this argument. First, the district court disciplined petitioner for misleading his client, and his family and friends, who were paying petitioner's fee, as to what he could accomplish and how he could accomplish it; the disciplinary action was not for collecting an excessive fee. Second, petitioner was put on clear notice that the matter of his fee was in issue by the allegations of the petition for order to show cause, by bar counsel's investigation report, which was attached to the petition, and by the complaint of Rene Cormier to Chief District Judge Coffrin which initiated this proceeding, which was described in the petition, and which was supplied to petitioner shortly after the petition for order to show cause was served upon him.

The memorandum and order of the United States Court of Appeals for the Second Circuit considered the identical contention asserted by Petitioner in his petition for a writ of certiorari from this Court. In rejecting petitioner's claim, the court of appeals found that the decision of the district court "clearly" stated that petitioner was being disciplined, not because of a fee that was *per se* excessive, but rather for improperly implying that he could influence the district attorney and the judge. The court of appeals further stated that the district court's order to show cause also "clearly" set forth the conduct of the petition that was being investigated and that, therefore, the petitioner had "received adequate notice of the charges against him." (P.A., pp. 2-3.)

SUMMARY OF ARGUMENT

The United States District Court for the District of Vermont did not depart from the accepted and usual course of judicial proceedings in connection with its conduct of the disciplinary proceedings regarding the petitioner. The United States Court of Appeals for the Second Circuit was correct in its determination that the petitioner had received adequate notice of the charges against him and that petitioner therefore had not been denied due process of law. Accordingly, there has been no departure by the lower courts from the principles of *In re Ruffalo,* 390 U.S. 544 (1968), and there is no need for this Court to exercise its power of supervision.

The facts of the case do not support petitioner's contention that he was disciplined because of having charged

an excessive fee. The facts do show clearly that petitioner was disciplined for having violated the provisions of the Code of Professional Responsibility alleged to have been violated by the petition for order to show cause.

———o———

ARGUMENT

1. Petitioner was given adequate notice of the charges alleged against him and was not denied due process of law.

The defects in procedure that were found to exist by this Court in the case of *In re Ruffalo*, 390 U.S. 544 (1968), were not present in this case. In *Ruffalo*, an attorney was charged in an Ohio disciplinary proceeding with twelve counts of misconduct, including two of soliciting clients through an agent. Both the attorney and the agent testified that the agent merely investigated cases for the attorney, including some cases against his own employer.

A thirteenth count was thereupon added by the Ohio disciplinary authority based upon the attorney's hiring the agent to investigate his own employer. The attorney was disciplined in the Ohio proceeding based upon count thirteen and six others, but the Sixth Circuit Court of Appeals subsequently disbarred the attorney on the basis of count thirteen alone. This Court reversed, on the grounds that the Ohio proceedings had become a trap since, while they were already underway, the charges had been amended based upon the testimony of the accused. 390 U.S. at 551.

Nothing like the fundamental unfairness of the *Ruffalo* situation is presented in the instant case.

The petition for order to show cause contained nineteen separate paragraphs, including the quotation of Disciplinary Rule 9-101(c). That rule provides that a lawyer shall not state or imply that he or she can influence improperly any tribunal or public official. The petition for order to show cause also alleged that petitioner had engaged in such conduct, which allegations were recited in several paragraphs—namely, numbers 11, 12, 13, 14, 15 and 16 (P.A., pp. 37-39). The district court's opinion contained the finding that the petitioner's "oblique suggestion led Cormier and his family to believe a favorable result would be assured by the payment of money. It was insinuated that improper means would be engaged to reach that purpose." (P.A., p. 21.)

Based on that finding and others set forth in the next part of this argument, it is clear that the district court did not subject petitioner to "trial by ambush," as claimed in his petition. No "trap" such as was found to exist in the *Ruffalo* case was present in this case.

Thus, petitioner's reliance on the *Ruffalo* case is misplaced and unwarranted. No violation of due process occurred.

2. The district court disciplined petitioner for implying he had improper influence, not for charging an excessive fee.

Petitioner seizes upon language in the district court's opinion wherein that court characterized his six thousand dollar fee for plea bargaining Mr. Cormier's case as unjustified on the record before it. In trying to show that

this was the district court's basis for imposing discipline, petitioner has taken this language out of context. The language of the opinion, taken as a whole, demonstrates that the district court imposed discipline because petitioner used improper means to justify and to collect this fee.

The district court stated, in pertinent parts, the following:

> The respondent's efforts to justify the fee and collect the full amount prior to sentencing created untoward inferences of special favors and influences to assure a favorable outcome. (P.A., p. 17)
>
> . . . . .
>
> In this instance the inference is plain that the respondent caused the accused to forego the assignment of counsel under the (Criminal Justice) Act, for which he was found qualified, in the false hope of special and favorable treatment to be gained from the respondent's participation as retained defense counsel. Instead of suppressing this false impression entertained by those who engaged him, the respondent allowed the false hope to continue. The delusion worked to the advantage of the respondent in obtaining an unjust fee. (P.A., pp. 19-20)
>
> . . . . .
>
> The fabric of the proof presented at the evidentiary hearing establishes with convincing clarity that the respondent's conduct in the course of the representation of the defendant, Rene Cormier, in Criminal No. 82-27-01 on the docket of this court, was against long-accepted standards of the legal profession. It is plain enough in the evidence that the accused, his family and friends were misled by false hope and veiled assurance of special favor. (P.A., p. 22)

Thus, it is clear that the district court disciplined petitioner for using improper means to justify and effectuate the collection of his full fee, not because the fee was excessive. There is no ambiguity on this point when the district court's remarks about the fee are read in context.

Any ambiguity in the district court's opinion is dispelled by the transcript of the hearing on petitioner's motion for new trial. Both Chief Judge Coffrin and Senior Judge Holden clearly announced from the bench that the discipline of petitioner was because he made improper assurances and implications to justify and collect his fee, not because the fee was excessive. See Transcript of Motion for New Trial, at 9-10. Judge Holden stated, in part:

> The thrust of the opinion, apparently, is misunderstood. The problem here is the means that were used to collect Six Thousand Dollars ($6,000) from a prisoner who was in jail and who had Eight Hundred Dollars ($800). And before—shortly before trial, the hope of favorable treatment many times hinged on whether or not he paid up the fee.
>
> Now, it isn't the fee that troubles this Court. I speak for all of us, I think. It's the way that was used to collect Six Thousand Dollars ($6,000) from an indigent prisoner. Tr. of Motion for New Trial at 9.

Moreover, Chief Judge Coffrin added, "I agree with Judge Holden in his statement as to the intention of the Court in this matter." *Id.* at 10.

It being clear that the district court imposed discipline upon petitioner for making misleading assurances in order to collect a fee, it is equally clear that petitioner was given notice of the actual charge upon which discipline was imposed. His argument that he was deprived

of notice of the charge against him requires this Court to assume that both Judge Coffrin and Judge Holden were mistaken as to why the court had imposed discipline upon him. Petitioner's attempt to nullify the entire proceeding for lack of notice is without support in the record.

Reduced to its simplest terms, petitioner was disciplined for exacting payment of his fee by implying that the money would be used to influence the district judge and the district attorney in order to secure the release of his client. Such conduct, as found by the district court to have been performed by the petitioner, is reprehensible and a violation of the Code of Professional Responsibility. Petitioner's suspension for one year was based on that violation and not for having charged an unreasonable fee.

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CONCLUSION

For the reasons stated above, the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be denied.

Dated: June 18, 1986.

Respectfully submitted,

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